

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

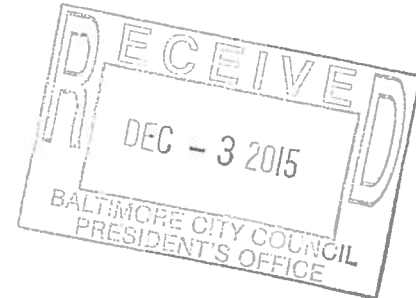


DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

December 2, 2015

The Honorable President and Members
of the Baltimore City Council
Attn: Natawna Austin, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202



Re: City Council Bill 15-0584 – Psychoactive Substances

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 15-0584 for form and legal sufficiency. The bill prohibits the distribution of psychoactive substances. It defines certain terms, imposes penalties for violations and provides for the seizure, testing, and destruction of these substances.

The Law Department's concern focuses on two sections of this bill: §§ 16-307 & 16-308. Section 16-307(a)(2) allows the Health Commissioner to suspend or revoke any license issued by the Department if the licensee "interferes with the performance of the Commissioner's duties." Section 16-308 provides for the suspension of licenses issued by the Department without the licensee having first been issued a violation notice when the Commissioner believes a licensee is distributing psychoactive substances.

Two problems exist with §16-307. First, this section is not narrowly tailored to the subject of the bill. The subject of the bill is the prohibition of psychoactive substances. The language, however, allows the Commissioner to suspend or revoke a license anytime a licensee interferes with the Commissioner's duties and not just when the licensee's activities are related to the distribution of psychoactive substances. Furthermore, the subsection fails to afford persons a reasonable opportunity to know what activities interfere with the duties of the Commissioner beyond the distribution of psychoactive substances.

The bill as drafted would prohibit any activity that interferes with the duties of the Commissioner. Yet, the identity of those activities will remain a matter of some conjecture and possible debate among those who might be affected by the prohibitions and those who would enforce them. I would hazard to say that the only person who definitively can know the answer to such questions is the Commissioner herself. For these reasons, §16-307(a)(2) is unconstitutionally vague and needs to be struck from the bill. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

Fav w/ Amend

The Law Department also carefully reviewed the provisions of §16-308, suspension of license without notice, for potential conflict with due process requirements. Typically a license to conduct a business is deemed a property right entitled to protection under due process. *Brooks v. State Bd. of Funeral Directors & Embalmers*, 233 Md. 98, 107 (1963). To this end, "some form of hearing" is required before an individual is deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The requirements of due process, however, do not compel adherence to any particular procedure. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). On the contrary, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In determining the extent to which due process may require a predetermination hearing, three distinct factors should be considered: 'first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'

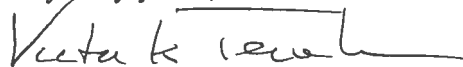
Attorney Grievance Comm'n v. Reamer, 281 Md. 323, 333 (1977), quoting *Mathews*, 424 U.S. at 333.

It is the Law Department's view that the interests of health and public safety provide sufficient justification in appropriate circumstances for the Commissioner to order the immediate suspension of a license without notice or an opportunity for a pre-suspension hearing. See *Barry v. Barchi*, 443 U.S. 55, 64-66 (1979); *Dixon v. Love*, 431 U.S. 105, 112-115(1977); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 314-321(1908). "Appropriate circumstances" in this instance means exigent circumstances where health and public safety are under imminent threat. If the enforcement of the law meets this test, then the Law Department concludes the law will be judged constitutional on its face and as applied. We point out that §16-308 allows for a hearing on suspension at a later time if a license is subject to immediate suspension.

The Law Department will approve the bill for form and legal sufficiency as drafted, provided the bill is amended as follows:

- (1) Page 6, delete lines 10 -11).
- (2) Page 6, Line 19, after the word safety, insert "because of exigent circumstances where health and public safety are under imminent threat".

Very truly yours,



Victor K. Tervala
Chief Solicitor

cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Elena DiPietro, Chief, Opinions & Advice
Hilary Ruley, Chief Solicitor
Jennifer Landis, Assistant Solicitor